FILE COPY

Office Supreme Court, U.S.
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 410

NATIONAL AIRCRAFT MAINTENANCE CORPORATION,

Petitioner,

—vs.—

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF CLAIMS

EDWARD R. FINCH, JR.,
Counsel for Petitioner,
36 West 44th Street,
New York 36, New York,
MUrray Hill 7-3636

INDEX

	PAGE
Statement	1
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statement of Case	2
A—The Basic Facts	2
B—The taking without compensation issue	4
C—The Court of Claims erred as a matter of law in deciding a question of fact on a cross-motion for summary judgment. Questions of fact must be tried	6
Reasons for Granting the Writ	7
Conclusion	7
Appendix	1a to 11a
A—Opinion of Court of Claims	1a
B—Order Amending Opinion	10a
C—Order on Motion to Reconsider	11a

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. .....

NATIONAL AIRCRAFT MAINTENANCE CORPORATION,

Petitioner,

—vs.—

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE U. S. COURT OF CLAIMS

Statement

National Aircraft Maintenance Corporation, your petitioner, prays that a writ of certiorari issue to review the judgment of the U. S. Court of Claims, entered in the above-entitled case on April 8, 1959, as amended April 15, 1959, and on July 13, 1959.

Opinions Below

The opinions on plaintiff's and defendant's motions for summary judgment (R. 147-154) as amended by the Court (R. 155) are not yet reported. The opinion on petitioner's motion for reargument (R. 178) is not yet reported.

Jurisdiction

The judgment of the Court of Claims dismissing the petition (R. 147-154) was entered on April 8, 1959, (*infra*, App. A, pp. 1a-9a). The judgment was amended by the Court of Claims (R. 155; *infra*, App. B, p. 10a). A petition for rehearing was denied on July 13, 1959 (R. 178), except with respect to personal property (*infra*, App. C, p. 11a). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. A. Section 1255 (1).

Questions Presented

1. Has the petitioner, National Aircraft Maintenance Corporation, had its property rights taken without just compensation so as to deny it its right under the Fifth Amendment?

2. Has the U. S. Court of Claims, on a motion and cross-motion for summary judgment, decided a material question of fact in controversy without taking necessary sworn testimony on the same?

STATEMENT OF CASE

A. The Basic Facts

For purposes of this petition we accept the facts stated in its opinion (App. A, *infra*, pp. 1a-3a) by the Court below:

> "Shortly after the outbreak of World War II the Civil Aeronautics Administration, under a so-called AP-4 agreement with the County of Suffolk, New York, built three runways and a parking area for airplanes on 1198.2 acres of land owned by the County, at a cost of about $1,000,000. It then entered into a lease of the lands from the County, to expire six months after the termination of the existing war. At its expiration defendant had the right to remove all improvements on the property.

"The following year, the lease was amended to run until June 30, 1967, unless sooner surrendered by defendant. Defendant then spent an additional $3,000,000 in constructing hangars, barracks, and other buildings and in improving landing facilities.

"World War II ended in the fall of 1945. The airport was declared surplus on January 11, 1946, and on February 13, 1947, defendant and the County entered into an agreement called 'Surrender of Leasehold', executed in conformity with Regulation 16 of the War Assets Administration, which regulation had been promulgated under the authority of the Surplus Property Act of 1944 (58 Stat. 768). Under this instrument defendant surrendered its lease on the 1198.2 acres and released and quitclaimed to the County the runways, taxiways, etc., and certain designated buildings, 'Excepting, however, from this conveyance all right, title and interest in and to * * * all buildings on the above described premises other than the buildings specifically enumerated above as being conveyed hereunder and reserving to the (United States) the right of removal thereof from the premises * * *.' There were 60 or 70 of these buildings, which defendant had constructed for troop barracks.

"Thereafter, the buildings were put up for sale. Some few were sold to individuals, who removed them from the premises, as they were required to do under the sales contract. The County was the highest bidder for the remaining 65, which it purchased for $5,600. Since these were on lands owned by the County, they were not required to be removed and they were not removed. These are the buildings defendant is alleged to have taken from plaintiff.

"One of the conditions upon which the lease was surrendered provided for the recapture of the premises by

the defendant in the event of a national emergency. It provided as follows:

> That during the existence of any emergency declared by the President of the United States of America or the Congress thereof, the Grantor shall have the right without charge, except as indicated below, to the full, unrestricted possession, control and use of the landing area, building areas and airport facilities, as such terms are defined in WAA Regulation 16, as amended, or any part thereof, including any additions or improvements thereto made subsequent to the declaration of the airport property as surplus; provided, however, that the Grantor shall be responsible during the period of such use for the entire cost of maintaining all such areas, facilities and improvements, or the portions used, and shall pay a fair rental for the use of any installations or structures which have been added thereto without Federal aid.

"Thereafter, on March 8, 1948, about a year after the surrender, the County leased the 1498.2 acres and all buildings and other improvements thereon to Walter F. McGinty. On July 29, 1948 McGinty assigned his lease to plaintiff * * *."

B. The taking without compensation issue

The lease between the County and McGinty assigned to petitioner contained the following provision:

> "Paragraph 24.
>
> "* * * * It is agreed by and between the parties hereto that in the event the airport is requisitioned or taken over pursuant to the provisions of the agreement between the Lessor and the United States Government, such requisition or taking over shall have the effect of extending the term hereof for a period of time equal to the period of such occupancy."

The Court of Claims erroneously held that the above provision was not a mere extension of the lease term. The Court of Claims held that by implication this simple extension, which constituted a form of compensation for petitioner's loss of occupancy of all or part of the airport, acted as a deletion of petitioner's lease term. Thus, the Court of Claims sanctioned the taking of petitioner's property, its lease, without just compensation being paid therefor.

The Court of Claims erred in reading into the express terms of the lease a provision contradictory to the expressed intention of the parties. It is obvious from the words themselves and from the fact that the respondent was entitled to take all or *part of the airport* (see Paragraph 24, *supra* p. 4, "pursuant to the provisions of the agreement between the Lessor and the United States Government", and see the terms of the agreement set forth *supra*, top of p. 4) that nothing other than an extension, i.e., an addition to the said term of the lease was intended.

This is further substantiated by the fact that no provision was made in the lease for an abatement of petitioner's rent during the period of respondent's occupancy, although the opinion of the Court of Claims reads as though the lease did contain such a provision.

Since it was anticipated that respondent would be paying a fair rent (See Paragraph 24) for any additions and improvements it "recaptured", or any non-aviation facilities it leased, a valuable benefit flowed from petitioner's lease during the time petitioner was unable to have actual possession of all or part of the airport.

This valuable benefit has been taken from petitioner by the implication arbitrarily read into petitioner's lease by the Court of Claims below. And further, the Court of Claims has sanctioned this taking without ordering just compensation to be paid to petitioner.

C. The Court of Claims erred as a matter of law in deciding a question of fact on a motion and cross-motion for summary judgment. Material questions of fact in controversy must be tried.

The Surrender of Leasehold provided that the respondent could recapture the landing area, building areas, and aviation facilities, paying rent for any additions and improvements to the same. Non-aviation facilities were not recapturable.

A question of fact was raised by respondent in its cross-motion for summary judgment. Petitioner had assumed that the 65 buildings declared non-aviation facilities in 1947 and sold as surplus were non-aviation facilities. Respondent, however, claimed that although at one time non-aviation facilities, said buildings had changed in character and become additions and improvements to the Building Area. Thus, the character of these 65 buildings was put in issue.

Although said question of fact had been raised in a motion for summary judgment the Court below did not hear evidence on the same. It simply granted respondent's cross-motion for summary judgment despite conflicting factual affidavits as to the existence of extensive non-aviation facilities, which conflicting factual question became evident upon argument by counsel for both sides on the motion.

Said issue of fact was of material importance. By the terms of the Surrender of Leasehold if the buildings in question were non-aviation facilities the respondent could not have recaptured said non-aviation facilities. If respondent could not have recaptured said facilities, petitioner would have the right to possession of said facilities. If respondent desired the possession of said facilities, it would then be required to condemn the property or to sublet the same from petitioner paying a fair rent to petitioner for the same.

If the facilities were not non-aviation facilities, then respondent could "recapture" them under the terms of the Surrender of Leasehold.

It is, therefore, of material concern whether said facilities are "non-aviation" or "not non-aviation" facilities.

REASONS FOR GRANTING THE WRIT

1. By deciding through implication that there was a complete deletion of petitioner's lease term from a lease provision which provided solely for an extension of a lease, the Court of Claims deprived petitioner of its property (i.e., the lease and the rent benefits flowing therefrom) and of its right to receive just compensation for the same.

2. By deciding a material fact issue in controversy on a motion and cross-motion for summary judgment the Court of Claims prevented petitioner from offering full evidence on said fact issue, which fact issue was of material importance to the petitioner's claim.

CONCLUSION

The ruling below deprives petitioner of its constitutional property rights and has also deprived petitioner of a hearing to present its evidence. This petition for a Writ of Certiorari should therefore be granted.

Respectfully submitted,

Edward R. Finch Jr.

EDWARD R. FINCH, JR.,
Counsel for Petitioner,
36 West 44th Street,
New York 36, New York.
MUrray Hill 7-3636

APPENDIX A

(Opinion)

[147]

IN THE UNITED STATES COURT OF CLAIMS

No. 386—55

(Decided April 8, 1959)

NATIONAL AIRCRAFT MAINTENANCE CORPORATION v. THE UNITED STATES

Mr. Edward R. Finch, Jr., for plaintiff. *Messrs. Albert L. Cox, Finch & Schaefler*, and *Thomas H. King* were on the briefs.

Mr. Thomas L. McKevitt, with whom was *Mr. Assistant Attorney General Perry W. Morton*, for defendant.

ON PLAINTIFF'S AND DEFENDANT'S MOTIONS FOR SUMMARY JUDGMENT

WHITAKER, *Judge*, delivered the opinion of the court:

Plaintiff, the lessee of the Suffolk County Airport, sues the United States for the alleged taking, for temporary use, of certain land and buildings on the airport grounds, without the payment of just compensation. The taking is not denied, but the defendant claims it was entitled to do so, upon the payment of a fair rental, which it says has been paid, not to plaintiff, but to the person the defendant says was entitled to demand and receive it.

Shortly after the outbreak of World War II the Civil Aeronautics Administration, under a so-called AP-4 agree-

ment with the County of Suffolk, New York, built three runways and a parking area for airplanes on 1198.2 acres of land owned by the County, at a cost of about $1,000,000. It then entered into a lease of the lands from the County, to expire six months after the termination of the existing war. At its expiration defendant had the right to remove all improvements on the property.

[118]

The following year the lease was amended to run until June 30, 1967, unless sooner surrendered by defendant. Defendant then spent an additional $3,000,000 in constructing hangars, barracks, and other buildings, and in improving landing facilities.

World War II ended in the fall of 1945. The airport was declared surplus on January 11, 1946, and on February 13, 1947, defendant and the County entered into an agreement called "Surrender of Leasehold", executed in conformity with Regulation 16 of the War Assets Administration, which regulation had been promulgated under the authority of the Surplus Property Act of 1944 (58 Stat. 768). Under this instrument defendant surrendered its lease on the 1198.2 acres and released and quitclaimed to the County the runways, taxiways, etc., and certain designated buildings. "Excepting, however, from this conveyance all right, title and interest in and to * * * all buildings on the above described premises other than the buildings specifically enumerated above as being conveyed hereunder and reserving to the [United States] the right of removal thereof from the premises * * *." There were 60 or 70 of these buildings, which defendant had constructed for troop barracks.

Thereafter, the buildings were put up for sale. Some few were sold to individuals, who removed them from the premises, as they were required to do under the sales contract. The County was the highest bidder for the remaining 65, which it purchased for $5,600. Since these were on lands owned by the County, they were not required to be removed

and they were not removed. These are the buildings defendant is alleged to have taken from plaintiff.

One of the conditions upon which the lease was surrendered provided for the recapture of the premises by the defendant in the event of a national emergency. It provided as follows:

> That during the existence of any emergency declared by the President of the United States of America or the Congress thereof, the Grantor shall have the right without charge, except as indicated below, to the full, unrestricted possession, control and use of the landing area, building areas and airport facilities, as such terms are defined in WAA Regulation 16, as amended, or any part thereof, including any additions or improvements thereto, made subsequent to the declaration of the air-

[149]

> port property as surplus; provided, however, that the Grantor shall be responsible during the period of such use for the entire cost of maintaining all such areas, facilities and improvements, or the portions used, and shall pay a fair rental for the use of any installations or structures which have been added thereto without Federal aid.

Thereafter, on March 8, 1948, about a year after the surrender, the County leased the 1198.2 acres and all buildings and other improvements thereon to Walter F. McGinty. On July 29, 1948 McGinty assigned his lease to plaintiff. The next day plaintiff leased to the Arabian American Oil Company (ARAMCO) 52.5 acres of the land, on which were located the buildings the County purchased from defendant, which are the buildings for the taking of which compensation is sought.[1]

[1] Suit is brought by plaintiff, instead of by ARAMCO, because of the provision in the lease that, in the event the premises were taken

The first question to be considered is the Government's right under the "Surrender of Leasehold" to recapture the buildings in question.

This document gives the defendant the right "to the full, unrestricted possession, control and use of the landing area, building areas and airport facilities, as such terms are defined in WAA Regulation 16, as amended, or any part thereof, including any additions or improvements thereto, made subsequent to the declaration of the airport property as surplus." The foregoing terms, "landing area", "building areas", and "airport facilities" are defined as follows (WAA Reg. 16; 32 CFR, 1946 Supp. § 8316.1(b)):

> (3) "Airport facilities" means any buildings, structures, improvements, and operational equipment, other than non-aviation facilities, which are used and necessary for or in connection with the operation and maintenance of an airport.
>
> (4) "Building area" means any land, other than a landing area, used or necessary for or in connection with the operation or maintenance of an airport.
>
> (5) "Landing area" means any land, or combination of water and land, together with improvements thereon

[150]

> and necessary operational equipment used in connection therewith, which is used for landing, take-offs, and parking of aircraft. The term includes, but is not limited to, runways, strips, taxiways, and parking aprons.

over by defendant, "the Lessee shall assign to the Lessor any and all claims which it may have against the Government for the use and occupation of said premises during the term of said occupation, exclusive of fixture claims based on improvements made by the Lessee as permitted by paragraph Third hereof."

(6) "Non-aviation facilities" means any buildings, structures, improvements, and equipment located in a building area and used in connection with but not required for the efficient operation and maintenance of the landing area or the airport facilities.

Were these buildings "airport facilities", or were they "non-aviation facilities"? That would seem to depend somewhat on the character of the airport, whether a military or a civilian airport, because the buildings were erected as barracks for troops. Certainly, if the "airport facilities" referred to were facilities for a military airport, barracks for airport personnel "are used and necessary for or in connection with the operation and maintenance of [a military] airport.". Inasmuch as the expression "airport facilities" is used in speaking of a possible repossession by the Air Force, it would seem that they must have had in mind facilities for the operation and maintenance of a military airport. If so, defendant had a right to repossess the buildings under the "Surrender of Leasehold."

However, what was done indicates that the defendant did not consider these buildings as "airport facilities", but rather as "non-aviation facilities", for, in the "Surrender of Leasehold" these buildings were specifically excepted from the buildings transferred to the County, and were later put up for sale and sold to the County for a cash consideration. This is significant because, under the Surplus Property Act of 1944 (58 Stat. 768) and WAA Regulation 16, property necessary for the operation of an airport might be transferred to local governments for other than a cash consideration, but not so as to property not necessary for the operation of the airport, to wit, "non-aviation facilities".

This indicates the parties did not consider these buildings "airport facilities", or, at least, that they were doubtful about whether or not they could properly be so considered. If not, they do not come within the recapture clause.

But, the recapture clause covered not only "airport facilities", but also "any additions or improvements thereto, made

[151]

subsequent to the declaration of the airport property as surplus." When the defendant repossessed the airport, both it and the County treated these buildings as such additions. The agreement of April 1, 1953, entered into a few days following repossession by defendant, recited that "certain additions and improvements have been made to the airport by the owner," and in a later paragraph it recited:

> It is agreed that the installations or structures added to the airport without Federal Aid for the use of which the Government shall pay a fair rental as provided by the terms of said "Surrender of Leasehold" consist of the following property:
>
> (a) The real property described in Exhibit D hereto annexed, containing 52.5 acres of land more or less, except Building T-83,[2] and
>
> (b) The following buildings as identified on map entitled, "Suffolk County Airport Building Layout" attached to and made a part thereof as Exhibit E, namely
>
> • • • • •

Then follows an agreement to pay to the County Treasurer rent on these buildings of $16,750.00 per annum.

The justification for treating these buildings as additions to the airport facilities, made by the owner after declaration of the airport as surplus, is that the defendant sold the buildings to the County, and the County left them on the airport property. This was treated as the equivalent of the erection

---

[2] These are the buildings sold to the County by defendant and leased to plaintiff as assignee of McGinty and subleased by plaintiff to ARAMCO.

of new buildings on the property after it had been declared surplus, and, since the defendant repossessed the airport for use of the Air Force, the barracks for Air Force personnel were properly considered as additions to the "airport facilities." While the parties had doubt about the propriety of treating them as "airport facilities", when the Government was turning them over to the County for operation as a civilian airport, they were properly considered as "airport facilities" when the Government repossessed them for a military airport.

At any rate, this is the construction put on the "Surrender of Leasehold" by the parties to it, and this is the best guide to what the parties intended.

[152]

The next question is, how does this affect plaintiff? It is, of course, bound by the terms of the "Surrender of Leasehold." The lease to McGinty, later assigned to plaintiff, recited that the lessee was familiar with the terms of the original lease on the airport and of the "Surrender of Leasehold" and "this lease and all subleases made hereunder shall be subject to all of the provisions of both such agreements." Not only was the lessee familiar with the terms of the "Surrender of Leasehold", but it must also have known that the parties did not consider these buildings as airport facilities, at least for a civilian airport, and, hence, that no right was reserved to repossess them as such. Whether or not they would be considered as additions to the airport facilities, when it was repossessed by defendant for a military airport, they did not know, but they should have known that they might reasonably be so considered, in which event the defendant had the right to repossess them upon the payment of a fair rental to the County for them.

It seems to us, therefore, that McGinty took a lease from the County with knowledge of the fact that defendant might repossess them under the reservation in the "Surrender of Leasehold." In that event, the defendant's obligation was

to pay to the County a fair rental therefor. Upon such payment defendant's obligation is discharged, whatever may be the rights and liabilities as between the County and its lessee. If there is any doubt that defendant has discharged its obligation by the payment of a fair rental to the County, the following provision in the County's lease to McGinty would seem to remove that doubt. The provisions reads:

> It is agreed by and between the parties hereto that in the event the airport is requisitioned or taken over pursuant to the provisions of the agreement between the Lessor and the United States Government, such requisition or taking over shall have the effect of extending the term hereof for a period of time equal to the period of such occupancy.

This lease was of the entire 1198.2 acres, including "airport facilities", "landing area", and "building areas", and the buildings in question.

[153]

Then came plaintiff's lease to ARAMCO, executed the day after plaintiff acquired McGinty's lease by assignment. This covered only the buildings in question. This lease provided:

> It is agreed that in the event the demised premises are requisitioned or taken over by the Government of the United States or any of its administrative agencies, by condemnation or pursuant to or by virtue of any of the provisions of the instruments hereinbefore recited or otherwise, such requisition or taking over shall have the effect of extending the term hereof for a period of time equal to the period of such occupation, but no rental whatsoever shall be paid by the Lessee for such period of occupation, and any rental paid by the Lessee in advance for a period covering the whole or any part of such period of occupation shall be refunded forthwith pro tanto by the Lessor to the Lessee * * *.

The provision in the lease to McGinty would seem to recognize the defendant's superior right under the "Surrender of Leasehold" to repossess the entire 1198.2 acres and all improvements thereon, for it provided for an extension of the term of the lease for a period equal to the period of occupancy by the defendant. This applied to the entire 1198.2 acres, including the buildings in question. By implication the above provision in McGinty's lease deletes from the term of the lease the period of defendant's occupancy, during which the plaintiff's duty to pay rent to the County was suspended. That duty with the corresponding right of possession was revived only when the defendant's occupancy terminated.

Plaintiff's own interpretation of its lease seems to conform to this as evidenced by the terms of its lease to ARAMCO, which applied only to the buildings in question. This provided for an extension equal to the period of the defendant's occupancy, and it expressly absolved ARAMCO from liability for rent during the period of the defendant's occupancy.

If the period of defendant's occupancy was to be deleted from the lease to McGinty and ARAMCO, then defendant's obligation was to pay the rent to the County. This has been done and plaintiff is not entitled to recover.

[154]

It results that plaintiff's motion for summary judgment must be overruled, and that defendant's like motion must be sustained and plaintiff's petition must be dismissed.

It is so ordered.

LARAMORE, *Judge;* MADDEN, *Judge,* and JONES, *Chief Judge,* concur.

[155]

APPENDIX B

(Order Amending Opinion)

IN THE UNITED STATES COURT OF CLAIMS

No. 386—55

NATIONAL AIRCRAFT MAINTENANCE CORPORATION

—v.—

THE UNITED STATES

ORDER

This case comes before the court on its own motion t
delete a phrase appearing in the opinion of April 8, 1959, an

It is ORDERED this fifteenth day of April, 1959, that t
following phrase which appears in the second sentence b
ginning on page five in the slip opinion of April 8, 195
be and the same is deleted:

> entered into a few days following repossession b
> defendant

By the Court

/s/ MARVIN JONES
MARVIN JONES
Chief Judg

[178]

APPENDIX C

(Order on Motion to Reconsider)

IN THE UNITED STATES COURT OF CLAIMS

No. 386—55

NATIONAL AIRCRAFT MAINTENANCE CORPORATION

—v.—

THE UNITED STATES

ORDER

This case comes before the court on plaintiff's motion to reconsider the judgment entered herein on April 8, 1959, together with defendant's response thereto and plaintiff's reply. Upon consideration thereof,

IT IS ORDERED this thirteenth day of July, 1959 that plaintiff's motion for rehearing be and the same is granted to the extent that the opinion of April 8, 1959, is amended by the addition thereto of the following to the last sentence:

> except as to plaintiff's claim for the alleged taking of any personal property of the plaintiff other than the personal property listed in the "Supplemental Instrument of Transfer", filed as Plaintiff's Exhibit A-7.

In all other respects plaintiff's motion is denied.

By the Court

/s/ MARVIN JONES
MARVIN JONES
Chief Judge.

FILE COPY

Office-Supreme Court, U.S.
FILED
OCT 14 1959
JAMES R. BROWNING, Clerk

No. 410

In the Supreme Court of the United States

OCTOBER TERM, 1959

NATIONAL AIRCRAFT MAINTENANCE CORPORATION,
PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,
PERRY W. MORTON,
Assistant Attorney General,
ROGER P. MARQUIS,
HUGH NUGENT,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinion below	1
Jurisdiction	1
Question presented	2
Statement	2
Argument	3
Conclusion	5

CITATIONS

National Aircraft Maintenance Corporation v. *County of Suffolk*, 189 N.Y.S. 2d 232	2, 3

In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 410

NATIONAL AIRCRAFT MAINTENANCE CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a-11a) is reported at 171 F. Supp 946.

JURISDICTION

The final order of the Court of Claims was entered on April 8, 1959, and a motion for reconsideration was, except with respect to one issue, denied on July 13, 1959 (Pet. App. 11a). The petition for a writ of certiorari was filed on September 15, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1255 (1).

QUESTION PRESENTED

Whether the Court of Claims misconstrued a lease of realty from Suffolk County, New York, to petitioner's assignor.

STATEMENT

In the fall of 1942, the Civil Aeronautics Administration constructed three runways and a parking area on land owned by Suffolk County, New York (Pet. App. 1a-2a). In January 1943, the county leased this airport area to the United States for a period running until six months after the termination of the war emergency (Pet. App. 2a). This lease was later extended to 1967, unless sooner surrendered by the United States (*ibid.*). After the airport had been declared surplus in 1946, the United States and Suffolk County entered into an agreement in 1947 under which the United States surrendered its lease, but reserved the right to repossess the airport during a national emergency (Pet. App. 2a-3a).

In March 1948, the county leased the property to Walter F. McGinty, and in July 1948, he assigned his lease to petitioner (Pet. App. 3a). More than two years later, the county terminated the lease. Petitioner then filed an action in the state court for a declaratory judgment that the county had improperly done so. See *National Aircraft Maintenance Corporation* v. *County of Suffolk*, 189 N.Y.S. 2d 232 (Sup. Ct., Suffolk County).

In March 1951, the United States exercised the right to repossess which it had reserved in the 1947 "Surrender of Leasehold" agreement, and petitioner and its sublessee were forced to vacate the airport (Pet.

1a, 6a-7a). Petitioner brought this suit in the Court of Claims in 1955 for the alleged taking of its leasehold and for destruction and conversion of certain personal property. On April 8, 1959, the court granted the United States' motion for summary judgment on the issue of the alleged taking (Pet. 1a, *et seq.*), reserving for later consideration the claim based on conversion of personal property (Pet. 11a). The court held that under the 1947 "Surrender of Leasehold" agreement, the United States had the right to recapture the airport facilities which it repossessed in 1951 (Pet. App. 4a-7a); that petitioner's assignor (McGinty) took his lease from the county subject to, and with knowledge of, the Government's right to repossession (Pet. App. 7a-8a); that under the "Surrender of Leasehold" agreement, the obligation of the United States upon repossession was "to pay to the County a fair rental therefor" (*ibid.*); and that "[u]pon such payment defendant's obligation is discharged, whatever may be the rights and liabilities as between the County and its lessee" (Pet. App. 8a).

On June 22, 1959, the New York state court held, in petitioner's suit against the county, that the lease between the county and petitioner's assignor was void from its inception because the county had no authority to enter into such a lease. *National Aircraft Maintenance Corporation* v. *County of Suffolk*, *supra*.

ARGUMENT

1. Although petitioner alleges that its property (*i.e.*, its rights under the lease from the county) was taken without just compensation (Pet. 2, 5, 7), its only substantive point actually argued is that the Court of

Claims misinterpreted the lease from the county to petitioner's assignor. That is solely a question of state landlord and tenant law which does not involve the Federal Government, and it presents no issue warranting review by this Court. Furthermore, a state court has recently held that the particular lease, whose construction by the Court of Claims is challenged, was void *ab initio* because the county had no power to enter into it. Under that ruling, petitioner had no property interest in the leasehold which could have been taken from him.

2. Petitioner also contends (Pet. 6-7) that the Court of Claims erred in granting summary judgment because there were material questions of fact. But the court specifically excluded from its judgment the only factual issue in the case, that involving the alleged taking of personal property. The question whether the buildings which the Government repossessed were aviation or non-aviation facilities was one of law rather than of fact. There was no factual dispute as to what the buildings were and how they were used. The only dispute was whether the Government could recapture them under the terms of the "Surrender of Leasehold" agreement and the applicable War Assets Administration regulation. This was clearly a legal rather than a factual question.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

ROGER P. MARQUIS,
HUGH NUGENT,
Attorneys.

OCTOBER, 1959

☆ U. S. GOVERNMENT PRINTING OFFICE 1959 937379 914